**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

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| **PROVIDENCE, SC** **Filed November 12, 2003** | | **SUPERIOR COURT** |
| **RHODE ISLAND PROPERTIES, LLC** | : | **C.A. No. PM 00-3846** |
| | : | **PM 00-2204** |
| | : | |
| **v.** | : | |
| | : | |
| **PROVIDENCE REDEVELOPMENT AGENCY** | : | |
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## DECISION

**GIBNEY, J.** Before this Court are three post-trial motions by Providence Redevelopment Agency (Defendant). Defendant moves this Court to reconsider its March 12, 2003 decision relative to Defendant's motion for a new trial or, in the alternative, for remittitur. Jurisdiction is pursuant to Superior Court Rules of Civil Procedure 59(a)(2) and 60(b)(3).

## FACTS/TRAVEL

Rhode Island Properties, LLC (Plaintiff) owned a vacant lot located at 280 Academy Avenue in Providence (the property). Depending on one's perspective of the record evidence, the property consists of 3,904 square feet (Plaintiff) or 3,865 square feet (Defendant). On May 2, 2000, Defendant filed a petition in the Superior Court, seeking an order declaring the amount of just compensation for seizure of the property to be $16,800. The Court granted the order, and on May 3, 2000, Defendant acquired the property by eminent domain. On September 24, 2001, the Superior Court issued a consent order wherein Plaintiff and Defendant agreed that Plaintiff should be paid $16,400 without prejudice to seek additional compensation. Consent Order of September 24, 2001 at 1. The Superior Court issued a second consent order on October 16, 2001 in

which Plaintiff and Defendant agreed, without prejudice to seek additional compensation, that Plaintiff should be paid an additional $400. Consent Order of October 16, 2001 at 1.

Plaintiff averred that $16,800 does not constitute just compensation for the property and has presented this Court with Joseph W. Accetta's appraisal, which estimates the fair market value (FMV) of the property to be $41,500. Alternatively, Defendant's expert, Thomas S. Andolfo, prepared a "restricted use appraisal,"[1] which estimates the property's FMV to be $16,800.

A trial was held in March 2003, and this Court determined the FMV of the property to be $41,500. Defendant timely filed motions for reconsideration, new trial or, in the alternative, remittitur.[2] This Court thereafter submitted to Plaintiff and Defendant specific questions which were addressed by the parties.

**MOTION FOR NEW TRIAL**

In civil non-jury trials, the trial judge may review his or her decision and grant a new trial only if he or she finds (1) "a manifest error of law in the judgment previously entered" or (2) newly discovered evidence that was unavailable at the first trial and is sufficiently important to warrant a new trial. Corrado v. Providence Redevelopment Agency, 110 R.I. 549, 554-555, 294 A.2d 387, 390 (1972). The Rhode Island Supreme Court stressed the high standard for establishing a manifest error of law, stating

[1] A "restricted use appraisal," is a type of appraisal report recognized by the Uniform Standards of Professionals in Appraisal Practice ("USPAP"). It is "intended for use only by the client, as the report cannot be understood properly by third parties without additional information as contained within the work file of this report." Andolfo Report at 2.

[2] As grounds therefore, Defendant contends that the decision is contrary to "the credible weight of the evidence," "the unbiased and uncontradicted evidence of certain witnesses and the weight thereof," and "the self-contradictory evidence of the Plaintiffs and the weight thereof." Defendant's Motion for New Trial at 1-2; Defendant's Motion for Reconsideration at 1-2. Defendant further contends that the decision "is not supported by sufficient evidence"; "is contrary to the applicable law, and fails to truly respond to the charge as given"; "ignores and is contrary to all reasonable inferences logically flowing from the evidence and weight thereof"; "fails to respond to the merits of the controversy and fails to administer substantial justice"; and "fails to respond directly to the merits of the controversy." Id.

> "For our purposes, a manifest error of law in a judgment would be one that is apparent, blatant, conspicuous, clearly evident, and easily discernible from a reading of the judgment document itself. If the error is not obvious unless one reads the underlying decision . . . the error is not a manifest error in our opinion." Am. Fed'n of Teachers Local 2012 v. R.I. Bd. of Regents for Educ., 477 A.2d 104, 106 (R.I. 1984).

Furthermore, a court should deny a motion for new trial "unless the newly discovered evidence is of such a material and controlling nature that it would probably change the outcome of the case and unless it was not by the exercise of ordinary diligence discoverable in time to be presented at the original hearing." Corrente v. Coventry, 116 R.I. 145, 147, 352 A.2d 654, 655 (1976).

This Court denies Defendant's motion for new trial for two reasons. First, no newly discovered evidence exists that was unavailable at the first trial. Second, the Court did not commit a manifest error of law in the judgment entered. A reading of the judgment document reveals no error that is apparent, blatant, conspicuous, clearly evident, and easily discernible. In light of the evidence presented to it, the Court ruled correctly. To the extent that, at trial, Defendant alluded to the issues it now raises regarding the total areas and developed nature of the lots constituting the comparables, this Court nevertheless correctly found Defendant's case unpersuasive. As this Court stated in its decision, Defendant's expert, Andolfo's restricted use appraisal failed to explain why the comparable sales were in fact comparable or what methodology he used to obtain the property's estimated FMV. He further failed to provide any indication of where the comparable sales were situated in relation to the property or any insight into the area surrounding the comparable sales, or to indicate which comparable sales were most or least similar to the property.

## MOTION TO RECONSIDER

In general, the Rhode Island Rules of Civil Procedure do not recognize or provide for a motion to reconsider. See generally, Hatfield v. Bd. of County Comm'rs for Converse County, 52 F.3d 858, 861 (10th Cir. 1995). However, a court can construe a motion to reconsider as a motion to vacate made under Rule 60(b). James Wm. Moore et. al., Moore's Federal Practice 1997 Rules Pamphlet ¶ 60.2[9] (1996). Rhode Island Superior Court Rule of Civil Procedure 60(b) provides, in pertinent part, that "[o]n motion and upon such terms as are just, the court may relieve a party … from a final judgment … for the following reasons: … (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Super. Ct. R. Civ. P. 60(b)(3). The moving party bears the burden of proving that relief should be granted from a final judgment. McDermott v. Terreault, 659 A.2d 119, 120 (R.I. 1995).

Misrepresentation and fraud, as the terms are used in Superior Court Rule of Civil Procedure 60(b)(3), possess different meanings and provide separate bases to vacate judgment. Pari v. Pari, 558 A.2d 632, 637 (R.I. 1989). While fraud typically necessitates "knowledge or reason to know of the falsity of a representation," misrepresentation can be accompanied by "several possible mental states, including negligent and innocent misrepresentation." Id. Moreover, misrepresentation has been defined as "a manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accord with the facts." Id. The Rhode Island Supreme Court has held that "even an innocent misrepresentation may be sufficient to grant relief from a judgment." Id.

This Court will construe Defendant's motion to reconsider as a motion to vacate made under Rule 60(b). Inasmuch as the total areas were not referenced correctly and developments on Comparable Nos. 2, 3, and 4 were not accounted for, the Court shall vacate and amend its judgment.

**COMPARABLE SALES**

In general, "the measure of damages to be awarded as compensation for property taken in eminent domain proceedings is the market value of the property." Assembly of God Church of Pawtucket, R.I. v. Vallone, 89 R.I. 1, 9, 150 A.2d 11, 15 (1959). Fair market value has been defined as "the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied." Id. In condemnation proceedings, the fair market value of the property is determined as of the date of the taking. Gorham v. Pub. Bldg. Auth. of Providence, 612 , A.2d 708, 712 (R.I. 1992). A taking occurs when "the right to enter and take possession accrues," which is generally upon the passage of title to the condemning authority. Id. at 713. Moreover, absent a physical intrusion upon the property by the condemning authority, title passes when it vests in the condemnor. Id. (holding that taking occurred on the date on which the condemnor (1) complied with the requirements of R. I. Gen. Laws § 45-50-13(a), the eminent domain statute; (2) filed a resolution with the town's land evidence records; and (3) deposited half of the estimated sum of just compensation for the condemned property with the Superior Court).

It is well-accepted that the value of real estate should be established on the basis of comparable sales, where they are available. Wordell v. Wordell, 470 A.2d 665, 667

(R.I. 1984). Evidence of comparable sales, when available, will typically serve to exclude the use of other means of determining fair market value. Capital Props., Inc. v. Rhode Island, 636 A.2d 319, 321 (R.I. 1994). When using the comparable sales method, the appraiser compares the condemned property with "substantially similar and comparable properties," analyzing the prices paid on the open market for the latter properties. Serzen v. Dir. of the Dep't of Envtl. Mgmt., 692 A.2d 671, 674 (R.I. 1997). The comparable property "need not be identical to the property in suit" as "[s]imilarity does not mean identical, but having a resemblance." 5 Nichols on Eminent Domain § 21.02[1][a] at 21-40 (3d rev. ed. 2003). In determining comparability, a court will look to the location and character of the property, the proximity in time of the comparable sale, and the way the property is used. Warwick Musical Theater v. Rhode Island, 525 A.2d 905, 910 (R.I. 1987). Whether a piece of property is sufficiently similar to the subject property to serve as a valid comparable sale is a question of fact to be decided by the trial court. 5 Nichols on Eminent Domain § 21.02[1][a] at 21-44 (3d rev. ed. 2003). On appeal, the trial justice's decision will not be overturned in the absence of an abuse of discretion. Id.

A number of courts have adopted the general rule that developed land cannot serve as a comparable sale of undeveloped land. See, e.g., Stewart v. Texas, 453 S.W.2d 524, 526 (Tex. Civ. App. 1970); State Road Commission of W. Va. v. Ferguson, 137 S.E.2d 206, 212 (W. Va. 1964). However, some courts have recognized a necessity-based exception to this rule where comparable sales of undeveloped land do not exist. See Bd. of County Comm'rs of Eagle County v. Vail Associates, Ltd., 468 P.2d 842,

(Colo. 1970); Westminster v. Jefferson Ctr. Assocs., 958 P.2d 495, 498 (Colo. Ct. App. 1997).

Furthermore, a presumption exists that "the price of land sold was fixed freely and not under compulsion." Sweet v. Murphy, 473 A.2d 758, 761 (R.I. 1984). "In the absence of evidence warranting a finding that a sale is made under such compulsion as to make the price inadmissible as evidence of value, consideration may be given to the sale." Id. Moreover, an expansion sale, whereby the buyer purchases property that expands the land he or she already owns, is not per se inadmissible without an element of compulsion. Memphis Hous. Auth. v. Peabody Garage Co., 505 S.W.2d 719, 722 (Tenn. 1974). Compare Bruce v. Rhode Island, 93 R.I. 466, 471, 176 A.2d 846, 848 (1962) (holding that sale made after taking by the state under its condemnation power is involuntary), with Memphis Hous. Auth., 505 S.W.2d at 721-22 (holding that sale of adjacent property was not the result of compulsion where (1) the seller, and not the buyer, was the party anxious to consummate the sale; (2) no discussion arose, prior to the offer of sale, of expanding the original property to include the adjacent lot; (3) the hotel, which was situated on the original lot, had no need for the adjacent lot because there was ample parking space; and (4) the corporation on the original lot did not purchase the adjoining lot until six months after it had purchased the original lot).

Finally, in almost every jurisdiction, the tax assessed value of a piece of land "is no evidence of its value for other than tax purposes." 5 Nichols on Eminent Domain § 22.1 at 22-1 (3d rev. ed. 2003). This exclusionary rule has been applied in the context of eminent domain proceedings. Id. at 22-1 to 22-6. See, e.g., State v. Griffith, 290 So. 2d 162, 163 (Ala. 1974) (noting that "[t]he greatly predominant view is that the assessed

value of land, when placed on the land by the assessors without intervention of the landowner, is not admissible as evidence of market value"); Conn. Printers, Inc. v. Redevelopment Agency, 270 A.2d 549, 553 (Conn. 1970) (stating that "the general rule is that assessed valuations made without the participation of the owner … are not usually admissible on the issue of the value of property taken by eminent domain"). This rule originates from the practical reason that "[a]lthough the assessor is required to appraise the value of the property, it is an open secret that the assessment rarely approaches the true market value." 5 Nichols on Eminent Domain § 22.1 at 22-10 (3d rev. ed. 2003). Moreover, in determining the fair market value of land destroyed by fire, the Rhode Island Supreme Court held that a tax assessor's statement as to what amount the land was taxed for was properly excluded because "[a]n assessment of taxes is not, of itself, evidence of market value." Spink v. New York, 26 R.I. 115, 116, 58 A. 499, 500 (1904).

## REVIEW OF THE EVIDENCE

In its Post-Argument Memorandum of Law, Defendant argues that the Court relied on a number of inaccuracies contained in Mr. Accetta's appraisal. An examination of each reveals the following.

### A. Comparable Nos. 2 and 4

Defendant argues that Comparable No. 2, which sold for $70,000, is comprised of two lots, totaling 10,116 square feet, rather than, as Plaintiff contended, only one lot 3,488 square feet in area. Similarly, Comparable No. 4, which sold for $74,000, contains two lots totaling 8,820 square feet, rather than, as Plaintiff's expert contended, only one lot consisting of 4,410 square feet. In both of these instances, therefore, the unit price that Plaintiff calculated, and later extrapolated to calculations involving the property, was

inflated because it was based on an incorrect total area. Defendant argues that the lots that Plaintiff failed to mention as comprising parts of Comparable Nos. 2 and 4 contained a duplex and consisted of improved real estate, respectively. In its response to the trial justice's inquiries, Plaintiff concedes that Comparable Nos. 2 and 4 no longer constitute valid comparable sales. Plaintiff's Response Memorandum at 1.

**B. Comparable No. 3**

Defendant contends that Comparable No. 3 also consists of two lots, for a total of 6,445 square feet sold at $70,000, rather than one lot with an area of 2,751 square feet as Plaintiff's expert represented. The lot that Plaintiff did mention, Defendant indicates, was, at the time of sale, an improved lot with five units (2 commercial, 3 residential).[3] In its response to the trial justice's inquiries, Plaintiff asserts that Comparable No. 3 is situated in a similar market area, was sold two years prior to the property, and is a corner site like the property. Plaintiff then calculated the correct unit price derived from the sale of Comparable No. 3[4] and multiplied it by the area of the property[5] to arrive at an estimated value of $42,397. Plaintiff, however, does not account for the then-improved nature of the comparable property, neither explaining how it does or does not factor into the unit price, nor establishing whether or not, given the disparate state of development of the properties, they are even comparable. Furthermore, Plaintiff fails to provide any evidence that use of this comparable is necessitated by a lack of other comparable sales of undeveloped lots. Accordingly, this Court finds that Comparable No. 3, given its developed state at the time of sale, is not a valid comparable sale.

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[3] Plaintiff's expert relies on the February 19, 1999 sale of Lot 371 for $70,000. Accetta Report at 2. It was not until December 6, 1999 that the building on Lot 371 was razed. Defendant's Post-Argument Memorandum of Law, Exhibit B.

[4] $70,000 divided by 6,445 square feet equals $10.86 per square foot.

[5] This calculation is based upon an area of 3,904 square feet.

### C. Comparable No. 1

Defendant notes that at the time of condemnation, the assessed value of the lots comprising Comparable No. 1 was $14,000 or $2.52 per square foot. However, this Court is mindful that tax assessment values are generally rejected as indicators of fair market value in condemnation proceedings. See 5 Nichols on Eminent Domain § 22.1 at 22-1 to 22-6 (3d rev. ed. 2003); Griffith, 290 So. 2d at 163; Conn. Printers, Inc., 270 A.2d at 553.

Defendant further argues that Comparable No. 1's unit price is likely inflated as the lots were bought by an abutting land owner that needed them for parking. However, Defendant has not presented this Court with sufficient evidence from which to rule that the sale was involuntary, rising to the level of compulsion. See Sweet, 473 A.2d at 761; Memphis Hous. Auth., 505 S.W.2d at 721-22.

Defendant also asserts that even using this unit price, the property value would equal only $26,475.[6] In this instance, Plaintiff correctly calculated the unit price,[7] and arrived at the same estimated value of the property as Defendant, but then made the following adjustments: (1) an addition of 9% for "time to the taking date of May 31, 2000," (2) an addition of 20% for location because the subject lot is situated in a location superior to that of the comparable lot, and (3) an addition of 20% for visibility and access because "the subject [lot] is at a highly traveled visible corner with access from three streets." Accetta Report at 2. After adding these adjustments, Plaintiff's expert determined the FMV to be $39,845.[8] Defendant has ignored these adjustments and has

[6] 3,865 square feet multiplied by $10.86 per square foot equals $26,475.
[7] Plaintiff's expert correctly stated in his appraisal report that Comparable No. 1 consists of two lots. Accetta Report at 2.
[8] Plaintiff then rounded this value to $40,000.

presented the Court with no reason to disregard them. However, this Court finds that Plaintiff's expert incorrectly calculated the adjustment for time to the taking date. Plaintiff's expert states that the adjustment is derived from a rate of "6% per year based on market activity," Accetta Report at 2, and then adds 9% to account for time to the date of taking. Thus, Plaintiff's expert adjusted the fair market value for greater than a year's time. However, the date of sale of Comparable No. 1 is December 21, 1999, and Plaintiff's expert states that the date of taking is May 31, 2000. See Defendant's Post-Argument Memorandum of Law, Exhibit D. As these two dates are only about 5 months apart, even if Plaintiff's expert's proposed date of taking were correct, Plaintiff's expert incorrectly adjusted the fair market value for more than a year's time.

This Court finds that the correct date of taking is, at latest, May 10, 2000, the date upon which $16,800 was received and deposited into the registry of the Court, and the date before which the Court entered an order declaring the title to the property to be in Defendant's name.[9] At a rate of 6% per year, the fair market value should be adjusted approximately 2.3% to account for the 4 months and 19 days between the date Comparable No. 1 was sold, December 21, 1999, and the date of the property's taking, May 10, 2000.[10]

This Court finds the adjustments for location, visibility, and access persuasive because (1) the property, located at 280 Academy Avenue, occupies a location superior to that of Comparable No. 1, located at 1099-1105 Atwells Avenue and (2) the property is accessible from three streets,[11] while Comparable No. 1 is accessible only from two

[9] On May 3, 2000, the Court entered an order whereby title to the property was found to be in Defendant's name.
[10] December 12, 1999 and May 10, 2000 are 4 months and 19 days apart.
[11] Academy Avenue, Belmont, and Chalkstone. Accetta Report, Tax Assessor's Plat Map.

streets.[12] With the 2.3% adjustment, in addition to Plaintiff's expert's adjustments for location, visibility, and access, the FMV of the property based on Comparable No. 1 is $38,053.86.[13]

## CONCLUSION

This Court, having denied Defendant's motion for new trial and granted Defendant's motion to vacate, now amends it judgment and finds that the FMV of the property, based on Comparable No. 1, is $38,053.86. Counsel shall submit the appropriate judgment for entry.

[12] Atwells Avenue and Parnell Street. Defendant's Post-Argument Memorandum of Law, Exhibit D.
[13] $26,742 plus a 42.3% adjustment equals $38,053.86.